Toh Huat Khay v Lim A Chang (in his capacity as the executor of the estate of Toh Hoy Khay, deceased)

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–23 OF 2008(P)
AUGUSTINE PAUL, ZULKEFLI AND MOHD GHAZALI FCJJ
23 NOVEMBER 2009

Land Law — Title — Indefeasibility of title — Transfer — Validity of — Restriction in interest on alienated land — Purported transfer in spite of express restrictions — Whether transfer unlawful — Whether transferee obtained defeasible title — National Land Code ss 109(2), 120, 122 & 124

Land Law — Transfer — Indefeasibility of title — Restriction in interest on alienated land — Purported transfer in spite of express restrictions — Whether transfer lawful — Whether obtained by means of insufficient or void instrument — Whether transferee obtained defeasible title — National Land Code s 340(2)(b)

This dispute revolved around a piece of land in Penang. At the outset, one Toh Boon Teng was occupying the said land, which was then state land, by virtue of a temporary occupation licence ('TOL'). Toh Boon Teng died on 17 April 1983 leaving a wife, Tang Kah Choo ('TKC') and four children. On 25 September 1996, the state authority alienated the said land to TKC and a document of title was issued. There were restrictions in interest endorsed on the document of title as follow: (a) that the said land could not be transferred within a period of ten years from the date of registration of the title; and (b) that after the period of ten years, the said land could only be transferred with the consent of the state authority. Notwithstanding the said restriction in interest, the defendant became the registered owner of the said land on 31 March 1998, ie, about 18 months after TKC had become the registered owner. The director of lands and mines purported to approve the transfer. Consequently, the plaintiff applied to set aside the transfer which was allowed by the High Court. The defendant's appeal to the Court of Appeal was dismissed. This court granted the defendant leave to appeal on the following questions: (i) whether on an application made by the registered proprietor, the state authority has the power, expressly or impliedly, pursuant to ss 113 and 124 of the National Land Code ('NLC') to grant consent to such registered proprietor, to transfer the land in question, the title of which contained a restriction in interest; and (ii) whether the transfer of the land in question, after the grant of the consent of the state authority, from the transferor to the transferee, has become indefeasible after registration

pursuant to the provisions of s 340 of the NLC read with ss 92 and 176(2) of the NLC.

Held, dismissing the appeal with costs:

(1) The said land, due to the said restriction in interest endorsed on the document of title pursuant to s 124(1)(b) of the NLC, could not be transferred by TKC to the defendant unless TKC as the proprietor had, prior to the transfer, applied to the state authority for the striking off or the rescission of the said restriction in interest. The defendant had not shown that such an application was made by TKC. There was also no evidence to show that the state authority had directed that the said restriction in interest be struck off the document of title or that a note of its rescission be so indorsed on the document of title pursuant to s 124(3) of the NLC (see para 18).

(2) If at all the state authority had approved the transfer of the said land, the land administrator, pursuant to s 124(7) of the NLC shall had to sign a memorandum in Form 7C in accordance with the direction of the state authority and shall present the same, and on the memorial thereof being made, the registrar shall make an entry on the register and issue document of title to the said land and shall note the date thereof and the authority therefore, and authenticate the same under his hand and seal. These are mandatory statutory requirements under the NLC which have to be adhered to before the said land could be transferred. It could not be assumed or implied that the state authority had complied with s 124 of the NLC in the instant appeal based merely on the said letter from the director of land and mines (see para 18).

(3) The transfer of the said land by TKC to the defendant was clearly in breach of the provisions of the NLC. The document of title had yet to be cleansed of the said restriction in interest and without the title being freed of such restriction in interest, the transfer of ownership was incapable of registration. That being the position, the registration of transfer of ownership to the defendant was not indefeasible since the registration thereof had been obtained by means of an insufficient or void instrument pursuant to s 340(2)(b) of the NLC (see para 29).

[Bahasa Malaysia summary

Pertikaian ini melibatkan sebidang tanah di Pulau Pinang. Faktanya ialah seorang yang bernama Toh Booh Teng menduduki tanah tersebut, yang pada ketika itu merupakan tanah negeri, melalui lesen pendudukan sementara ('LPS'). Toh Boon Teng meninggal pada 17 April 1983 meninggalkan seorang isteri, Tang Kah Choo ('TKC') dan empat orang anak. Pada 25 September 1996, pihak berkuasa negeri memberi milik tanah tersebut kepada TKC dan dokumen hak milik dikeluarkan. Terdapat sekatan kepentingan

yang diendorskan pada dokumen hak milik seperti berikut: (a) tanah tersebut tidak boleh dipindah milik bagi tempoh sepuluh tahun dari tarikh pendaftaran hak milik; dan (b) bahawa selepas tempoh sepuluh tahun tersebut, tanah tersebut hanya boleh dipindah milik dengan persetujuan pihak berkuasa negeri. Walaupun dengan sekatan kepentingan, defendan menjadi pemilik berdaftar tanah tersebut pada 31 Mac 1998 iaitu kira-kira 18 bulan selepas TKC menjadi pemilik berdaftar. Pengarah tanah dan galian bertujuan untuk meluluskan pindah milik tersebut. Oleh demikian, plaintif memohon untuk mengetepikan pindah milik tersebut yang dibenarkan oleh Mahkamah Tinggi. Rayuan perayu ke Mahkamah Rayuan ditolak. Mahkamah ini memberikan kebenaran untuk merayu atas soalan-soalan berikut: (i) sama ada atas permohonan yang dibuat oleh pemilik berdaftar, pihak berkuasa negeri mempunyai kuasa, secara langsung atau tidak langsung, menurut ss 113 dan 124 Kanun Tanah Negara ('KTN') untuk memberikan persetujuan untuk pemilik berdaftar berkenaan, untuk memindah milik tanah yang dipersoalkan, yang hak miliknya mengandungi sekatan kepentingan; dan (ii) sama ada pindah milik tanah yang dipersoalkan tersebut, selepas pemberian persetujuan oleh pihak berkuasa negeri, daripada pemberi pindah milik kepada penerima pindah milik, menjadi tidak boleh sangkal selepas pendaftaran berikutan peruntukan s 340 KTN dibaca dengan ss 92 dan 176 KTN.

Diputuskan, menolak rayuan dengan kos:

(1) Tanah tersebut, disebabkan oleh sekatan kepentingan yang diendorskan pada dokumen hak milik berikutan s 124(1)(b) KTN, tidak boleh dipindah milik oleh TKC kepada defendan kecuali TKC sebagai pemilik, sebelum pindah milik telah memohon kepada pihak berkuasa negeri untuk pembatalan atau penamatan sekatan kepentingan tersebut. Defendan tidak menunjukkan bahawa permohonan sedemikian telah dibuat oleh TKC. Juga tidak ada keterangan untuk menunjukkan bahawa pihak berkuasa negeri telah memberikan arahan untuk sekatan kepentingan tersebut dibatalkan daripada dokumen hak milik atau nota penamatannya diendorskan pada dokumen hak milik berikutan s 124(3) KTN (lihat perenggan 18).

(2) Jika benar pihak berkuasa negeri telah meluluskan pindah milik tanah tersebut, pentadbir tanah, berikutan s 124(7) KTN semestinya telah menandatangani memorandum dalam Borang 7C berikutan arahan oleh pihak berkuasa negeri dan mesti mengemukakannya dan selepas maklumat tersebut dikemukakan, pendaftar mestilah membuat kemasukan dalam daftar dan mengeluarkan dokumen hak milik untuk tanah tersebut dan mencatatkan tarikh dan kuasanya, dan mengesahkannya dengan tandatangannya dan memterainya. Ini adalah keperluan mandatori di bawah KTN yang mesti dipatuhi sebelum tanah tersebut dipindah milik. Ia tidak boleh dianggap atau tersirat

bahawa pihak berkuasa negeri telah mematuhi s 124 KTN di dalam rayuan ini semata-mata berdasarkan kepada surat daripada pengarah tanah dan galian (lihat perenggan 18).

(3) Pindah milik tanah tersebut oleh TKC kepada defendan jelas melanggar peruntukan KTN. Dokumen pindah milik masih mengandungi sekatan kepentingan dan tanpa penamatan sekatan kepentingan pada hak milik tersebut pindah milik pemilikan tidak boleh didaftar. Disebabkan keadaan ini, pendaftaran pindah milik pemilikan kepada defendan boleh disangkal kerana pendaftarannya telah diperoleh melalui instrumen yang tidak mencukupi atau tidak sah berikutan s 340(2)(b) KTN (lihat perenggan 29).]

Notes

For cases on indefeasibility of title, see 8 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4755–4759.

Cases referred to

Dr Ti Teow Siew & Ors v Pendaftar Geran-Geran Tanah Negeri Selangor [1982] 1 MLJ 38, HC (folld)

Goo Hee Sing v Will Raja & Anor [1993] 3 MLJ 610, HC (folld)

United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352, HC (folld)

Legislation referred to

National Land Code ss 5, 24(3), (7), 65, 66, 67, 68, 69, 92, 113, 120, 120(2), (3), 121(1)(b), 124, 124(1)(b), (3), (7), 176(2), 214(1), (2), (2)(b), 340, Forms 7C, 14A

Appeal from: Civil Appeal No P-02–295 of 2005 (Court of Appeal, Putrajaya)

Mahinder Singh Dulku (Mahinder Singh Dulku & Co) for the appellant.
Tan Kah Hoo (Gan Teik Chee & Ho) for the respondent.

Mohd Ghazali FCJ (delivering judgment of the court):

[1] On 28 July 2008 this court granted the appellant (the defendant in the originating action) leave to appeal on the following questions:

(a) Whether on an application made by the registered proprietor the state authority has the power, expressly or impliedly, pursuant to ss 113 and 124 of the National Land Code, to grant consent to such registered proprietor, to transfer the land in question, the title of which contains a restriction in interest initially imposed by the state authority prohibiting such transfer for a period of ten years.

(b) Whether the transfer of the land in question, after the grant of the consent of the state authority, from the transferor to the transferee, has become indefeasible after registration pursuant to the provisions of s 340 of the National Land Code read with ss 92 and 176(2) of the National Land Code.

THE BACKGROUND

[2] This dispute revolves around a piece of land known as No HS(M) 1368, in Mukim 12, Daerah Barat Daya, Pulau Pinang ('the said land'). At the outset, one Toh Boon Teng was occupying the said land, which was then state land, by virtue of a temporary occupation licence ('TOL'). It seems that it was then the policy of the state authority that when the holder of a TOL on state land in that area passes away, his beneficiaries can make an application to the state authority for such land to be alienated to them.

[3] Toh Boon Teng died on 17 April 1983 leaving a wife and four children, namely:

(a) Tang Kah Choo, ie,Toh Boon Teng's wife ('TKC');

(b) Toh Hoy Khay (the plaintiff in the originating action, who died on 18 January 2004 during the proceedings and is now represented by his estate);

(c) Toh Huat Khay, ie, the appellant (the defendant in the originating action);

(d) Toh Huat Sing; and

(e) Toh Ah Bee @ Toh Siew Bee (f).

For ease of reference, we will refer to the appellant as the defendant and the respondent as the plaintiff.

[4] After the death of Toh Boon Teng, the beneficiaries agreed that an application be made to the state authority for title. Several years later, the plaintiff discovered that the state authority had alienated the said land to TKC on 25 September 1996 and that a document of title was issued.

[5] There were restrictions in interest endorsed on the document of title to the said land which read as follows:

> Sekatan-Sekatan Kepentingan.
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> Tanah yang diberi milik ini tidak boleh dipindah milik dalam masa 10 tahun dari tarikh pendaftaran hakmilik dan selepas tempoh ini pindah milik tidak dibenarkan tanpa kebenaran Pihak Berkuasa Negeri.

A Tanah yang diberimilik ini tidak boleh dicagar, pajak, pajakan kecil atau sebarang bentuk jua sekalipun tanpa kebenaran Pihak Berkuasa Negeri.

For the purpose of this instant appeal, we are only concerned with the first restriction in interest which has two limbs, namely:

B (a) that the said land cannot be transferred within a period of ten years from the date of registration of the title ('the said restriction in interest');

(b) that after the period of ten years, the said land can only be transferred with the consent of the state authority.

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[6] Notwithstanding the said restriction in interest, the defendant became the registered owner of the said land on 31 March 1998, ie, about 18 months after TKC had become the registered owner.

D **[7]** Consequently the plaintiff filed this suit and sought the following reliefs:

(a) a declaration that the transfer of the said land to the defendant was fraudulent and that registration was obtained by means of an insufficient instrument;

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(b) that if prayer (a) is granted, an order that the transfer of the said land to the defendant be set aside;

(c) an order that the plaintiff and the defendant be appointed trustees to hold the said land for all the four beneficiaries in undivided shares of 1/4 each;

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(d) an order that the defendant shall execute a transfer in Form 14A and other necessary documents to the four beneficiaries in equal shares;

(e) alternatively, that the plaintiff and defendant be appointed trustees for five beneficiaries according to the deceased's will, viz, the four children of the deceased and Toh Kim Hock who is the deceased's grandson;

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(f) an order that the defendant shall execute a transfer of the said land in Form 14A to all the five beneficiaries in equal shares;

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(g) an order that if the defendant fails to comply with the order granted either under paras (d) or (f), that the senior assistant registrar be given power to execute the Form 14A; and

(h) costs.

I

THE HIGH COURT

[8] At the end of the trial, the parties agreed that the issues that needed to be determined by the court was whether the transfer of the said land by TKC

to the defendant was in breach of the said restriction in interest and accordingly whether the transfer was lawful.

[9] In his judgment, the learned trial judge, Mohd Noor Abdullah J (as he then was) was of the view that the transfer of the said land by TKC to the defendant was in breach of the said restriction in interest and thus null and void. The learned trial judge gave the following reasons for his decision:

(1) If the terms of a statute are absolute and do not admit of any relaxation or exemption, anything done in contravention thereof will be ultra vires and no person can be estopped from putting forward the contention that what was done was illegal or void.

United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352.

(2) Whenever a title contains a restriction in interest where the prohibition in dealing with the land is total, nothing can happen until that prohibition has been overcome.

Goo Hee Sing v Will Raja & Anor [1993] 3 MLJ 610.

(3) No court is at liberty to enforce as valid, that when a statute has declared shall not be valid nor can compliance therewith be dispensed with even by consent of the parties or by failure to plead or argue the point at that outset.

Surajmull v Triton Insurance Co Ltd 1925 PC 83.

(4) The intention of the state authority in imposing the restriction in interest in the title is clear and unambiguous and the expression used admit of no other interpretation except that it is absolute prohibition during the first ten years and thereafter the state authority is given a discretion to transfer it or refuse to do so.

[10] Based on the above premises, the learned trial judge ordered that the said land be transferred to the estate of TKC for distribution to the beneficiaries.

THE COURT OF APPEAL

[11] The defendant's appeal to the Court of Appeal was dismissed. In delivering the judgment of the court, Gopal Sri Ram JCA (as he then was) summarised the facts as follows:

(a) the title to the said land carries an indorsement which absolutely prohibits its transfer to any person for a period of ten years and thereafter permits its transfer only with the consent of the state authority;

(b) the title was issued on 25 September 1996; according to the terms of the indorsement it could not be transferred at all until 24 September 2006 and thereafter only with the consent of the state authority;

(c) in 1996, an application was made by TKC (though in his evidence at the trial the defendant acknowledged that he was the real applicant) to have the said land transferred to the defendant;

(d) despite the express terms of the indorsement, the Director of Lands and Mines purported to approve this transfer and the said land was eventually transferred and registered in the defendant's name on 31 March 1998; and

(e) the plaintiff (now vide the personal representative of his estate) brought an action to set aside the transfer.

[12] In his judgment, Gopal Sri Ram JCA said:

> The only issue in this appeal is whether the transfer to the appellant is valid. The appellant relies on the purported consent given by the Director of Lands and Mines. So, everything turns upon whether the director acted lawfully in giving his consent. That depends on whether he acted in accordance with the relevant written law, the National Land Code ('the Code').
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> Now, s 109(2)(a) of the Code which applies to the subject land provides that such land shall, upon alienation, become subject to:
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> > such express conditions and restriction in interest (if any) as are then endorsed on the document of title thereto (or referred to therein); being conditions and restrictions imposed by the state authority under the powers conferred by ss 120–122.
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> The power to impose conditions is vested in the state authority by s 120 of the Code. Additionally, s 124 of the Code confers upon the state authority the power to alter or rescind any conditions expressed in a title.
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> In the present case, Tang Kah Choo did not apply to the state authority to rescind the express restriction prohibiting transfer for a period of ten years from the date of the alienation. Instead, she merely applied for permission to transfer the land to the appellant. The director therefore had no power whatsoever to act as he did since the repository of that power was the relevant state authority. It follows that the act of the land administrator in the registering of the transfer to the appellant was unlawful, null and void. Consequently, the appellant obtained a title that was defeasible in his hands.
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> In *M & J Frozen Foods Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294, Wan Yahaya SCJ quoted with approval the following passage in the judgment of Ajaib Singh J (as he then was) in *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7 in relation to the nature of a title obtained in violation of the provisions of the Code:

I held that in the present case the alienation of the land under qualified title to the respondent did not involve a mere irregularity or non-compliance with the statutory procedure relating to the method of acquiring alienation of qualified title but that the state authority had acted ultra vires the National Land Code and therefore the alienation of the land under qualified title was illegal and a nullity. Consequently, the conclusiveness of title and the indefeasibility provisions in the Code were rendered irrelevant and inapplicable.

The position here is a fortiori. If the act of the state authority in violating the Code gave no title to Teh Bee so too in the present case the appellant obtained no title in consequence of the director acting in breach of the Code. The judge was therefore correct in making the orders he did. The appeal was accordingly dismissed and those orders made that are usually consequent upon a dismissal.

JUDGMENT OF THIS COURT

[13] The document of title to the said land showed that TKC had become the first registered owner on 25 September 1996. The said land was subject to the said restriction in interest imposed under s 120 of the National Land Code ('the Code'), viz, that the said land cannot be transferred within a period of ten years from the date of registration of the title. Section 120 of the Code reads:

(1) Subject to the provisions of this section, the *State Authority may alienate land under this Act subject to such express conditions and restrictions in interest* conformable to law as it may think fit.

(2) The conditions and restrictions in interest to be imposed under this section in the case of any land shall be determined by the State Authority at the time when the land is approved for alienation.

(3) Every condition or restriction in interest imposed under this section shall be endorsed on or referred to in the document of title to the land; and in complying with this sub-section the State Authority shall, in any case where it imposes both conditions and restrictions in interest, distinguish between the two.

(4) ...
(Emphasis added.)

Section 5 of the Code provides 'restriction in interest' means 'any limitation imposed by the state authority on any of the powers conferred on a proprietor by Part Nine, or on any of his powers of dealing under Division IV, and any like limitation imposed under any previous land law'.

[14] Section 124(1)(b), (3) and (7) of the Code reads:

(1) The proprietor of any alienated land may apply to the State Authority under this section for —

A (b) the *rescission of any express condition or restriction in interest endorsed on*, or referred to in, the document of title thereto,...;

(3) Where the State Authority approves any application under paragraph (b) of sub-section (1), it shall direct that condition, *restriction in interest or expression in question be struck off* the document of title to the land or, in the case of any condition or restriction which is merely referred to in the document of title, that *a note of its rescission be so indorsed*.

(7) Upon approval by the State Authority under this section, *the Land Administrator shall sign a memorandum in Form 7C in accordance with the direction of the State Authority* and shall present the same, and on the memorial thereof being made, *the Registrar shall make an entry on the register and issue document* of title to the land and shall note the date thereof and the authority therefor, and authenticate the same under his hand and seal.

D (Emphasis added.)

[15] The evidence showed that about six months after TKC had become the registered owner of the said land, by letter dated 26 March 1997 and addressed to TKC, the director of land and mines wrote as follows:

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Permohonan Untuk Mendapat Kebenaran Pihak Berkuasa Negeri Untuk Memindah Milik HS(M) 1368, Mukim 12, Daerah Barat Daya

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F Merujuk kepada perkara tersebut di atas, *adalah dimaklumkan bahawa Pihak Berkuasa Negeri telah memberi kebenaran* Tang Kah Choo (K.P. 3469 512) untuk *memindah milik* kepada Toh Huat Khay (K.P. 361023-07-5069).

(Emphasis added.)

G Thus, from the above letter, it can be seen that the director of land and mines informed TKC that the state authority had granted its consent for the said land to be transferred to the defendant. On the surface of it, that letter would denote that an application was made by TKC for permission to transfer the said land to the defendant, though in his evidence at the trial the defendant H acknowledged that he was the real applicant.

[16] Subsequent to the said letter from the director of land and mines referred to above, an indorsement was made by the Land Administrator, Daerah Barat Daya, Pulau Pinang on the document of title to the said land I to reflect the dealing, viz, that the said land was transferred to the defendant who had become the registered owner on 31 March 1998. I noted that the document of title to the said land showed that the said restriction in interest remained endorsed on the title when the indorsement with regards to the transfer in ownership was made. There was nothing to show that the said

restriction in interest was struck off the document of title neither was there an indorsement of a note of its rescission. The question that now arises is whether such a dealing, ie, a transfer in ownership can be effected under the provisions of the Code whilst the said restriction in interest still remained on the document of title.

[17] Section 5 of the Code provides that the word 'dealing' means 'any transaction with respect to alienated land effected under the powers conferred by Division IV, and any like transaction effected under the provisions of any previous land law, but does not include any caveat or prohibitory order'. Part 14 of the Code deals with transfers and transfers fall within the contemplation of the word 'dealing' under the Code. Section 214(1) of the Code provides, inter alia, that subject to sub-s (2) any alienated land shall be capable of transfer. Section 214(2)(b) of the Code provides the power to transfer shall be exercisable in any particular case subject to any restriction in interest to which the land in question is for the time being subject.

[18] The evidence showed that the said land was still subject to the said restriction in interest when it was transferred to the defendant. That being the situation, I am of the view that the said land, due to the said restriction in interest endorsed on the document of title pursuant to s 124(1)(b) of the Code, cannot be transferred by TKC to the defendant unless TKC as proprietor had, prior to the transfer, applied to the state authority for the striking off or the rescission of the said restriction in interest. The defendant has not shown that such an application was made by TKC. There was also no evidence to show that the state authority had directed that the said restriction in interest be struck off the document of title or that a note of its rescission be so indorsed on the document of title pursuant to s 124(3) of the Code. If at all the state authority had approved the transfer of the said land, the land administrator, pursuant to s 124(7) of the Code shall have to sign a memorandum in Form 7C in accordance with the direction of the state authority and shall present the same, and on the memorial thereof being made, the registrar shall make an entry on the register and issue document of title to the said land and shall note the date thereof and the authority therefor, and authenticate the same under his hand and seal. These are mandatory statutory requirements under the Code which have to be adhered to before the said land can be transferred. I am of the view that it cannot be implied that such requirements have been complied with based merely on the said letter from the director of land and mines.

[19] No evidence was adduced at the trial to show that the mandatory statutory requirements under the Code discussed above had been complied with, viz, there is nothing to show that the said restriction in title has been struck off the document of title or a note of its rescission indorsed on the

document of title. What was before the learned trial judge was only the evidence of the land administrator, Mohd Yusof Wazir ('SP10'). In examination-in-chief, SP10 testified that the transfer of the said land from TKC to the defendant who had become the registered owner on 31 March 1998 was in breach of the said restriction in interest. Under cross-examination, he testified that the state authority had given its approval for the said transfer notwithstanding the said restriction in interest. In answer to a question by the court, SP10 said as follows:

> Tak setuju 10 tahun sekatan itu absolute dan kemudian boleh pindah milik dengan kebenaran EXCO. Perhatian 10 tahun dari tarikh pendaftaran bermakna dari tarikh TOL diberi. TOL diberi pada awal 1980an.

Thus, according to SP10, the ten year restriction on transfer commenced from the date the TOL was issued. He then stated that the TOL was first issued at the beginning of the 1980s but did not elaborate further on this point.

[20] From my reading of the evidence of SP10, I would deduce that he seems to be of the view that the said restriction in interest had expired when TKC made the application to transfer the said land to the defendant. With due respect to SP10, I find his answer in response to the question posed by the court was based on premisses which are incomprehensible and are not in accordance with the provisions of the Code. SP10 seems to suggest that the ten year restriction starts to run when Toh Boon Teng was first granted a TOL to occupy the said land when it was then state land. That conclusion by SP10 would seem to run contrary to the provisions of ss 65–69 of the Code which deals with the subject of TOL. A TOL is merely a licence granted to occupy, inter alia, state land and is issued for a term expiring not later than the end of the calender year in which it commences. A TOL can be renewed. A TOL granted over state land does not of course tantamount to an alienation and a TOL is definitely not a document of title. I do not wish to deal further with what was said by SP10 as I find no nexus between the TOL granted to Toh Boon Teng when the said land was still state land and the restriction in interest endorsed on the document of title to the said land. I cannot see how the court can rationally accept that part of SP10's evidence.

[21] It was held in *Dr Ti Teow Siew & Ors v Pendaftar Geran-Geran Tanah Negeri Selangor* [1982] 1 MLJ 38 that a restriction in interest commences from the date of registration of the document of title. In that case, the title to the land in question carried the following endorsement of restriction in interest, namely, 'The land hereby leased shall not be transferred or leased for a period of fifteen years without the consent of the Ruler in council'. A memorandum of transfer and charge were presented for registration but were rejected by the Registrar of Titles, the respondent on the ground that the

restriction in interest was still subsisting. The question before the court was whether the restriction in interest commenced from the date endorsed on the title, that is 18 August 1964 or the date when the alienation was registered, that is on 9 November 1967. The court held that the restriction in interest commenced from the date of registration of the register document of title, that is, 9 November 1967, and the registrar of titles was therefore correct in rejecting the documents presented for registration. In his judgment, Hashim Yeop A Sani J (as he then was) said (at p 39):

> It can be seen clearly that the central and only issue in this case is on what date the restriction in interest commenced. The applicant relies on the particulars appearing on p 2 of the title which states that the application was given the title on 18 August 1964 and if the restriction in interest commenced on that date it therefore expired on 17 August 1979. Based on this calculation therefore the respondent would be wrong in rejecting the application for registration.
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> The respondent, on the other hand, relies on s 78(3) of the National Land Code which states that the alienation of state land shall take effect *upon registration* and the date of registration being 9 November 1967 the period of 15 years has not ended.
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> It is not disputed that the proper registering authority under the Land Code has the right to reject any instrument on the ground that it is unfit for registration. Counsel for applicant argued that for purposes of calculating the period for the operation of the restriction in interest in this case the question of registration is irrelevant. With respect I totally disagree. Registration is central in the Torrens system and in any statute like the National Land Code which carries the Torrens system. As Edwards J said in delivering the judgment of the Court of Appeal in *Fels v Knowles* (1906) 26 NZLR 604:
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> The cardinal principle of the statute is that the register is everything ...
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> It is registration that gives and extinguishes title under the National Land Code. Registration is the cornerstone of the Torrens system.
>
> According to s 105 of the National Land Code, restriction in interest starts to run from the date of alienation. Section 105 reads as follows:
>
> (1) Every condition or restriction in interest imposed by or under this Act shall, except where it is otherwise provided by this Act or the context requires, commence to run from the date of alienation of the land to which it relates.
>
> In my opinion the word 'alienation' is crucial for the proper interpretation of s 105. Section 78(3) of the Code determines when an alienation of state land shall take effect and it is clear from that sub-section that alienation takes effect *upon registration*. Section 78(3) of the Code reads as follows:
>
> (3) The alienation of State land shall take effect *upon the registration* of a register document of title thereto pursuant to the provisions referred to sub-section (1) or (2), as the case may be; and, notwithstanding that its alienation has been approved by the State Authority, the land shall remain State land until that time. (Emphasis mine).

A It is to be observed in the second limb of that sub-section until the date of registration the land shall remain state land.

The importance of registration is again and again emphasised in the Code. Thus in the definition of 'restriction in interest' in s 5 of the Code the expression is defined to mean any limitation imposed by the state authority or any conditions B imposed on a *proprietor* in Pt 9 and Division IV of the Code. The definition of 'proprietor' in the same section of the Code describes a proprietor to mean any person or body for the time being *registered as proprietor* of any alienated land.

Thus it is clear in law that for the purposes of the National Land Code the first applicant was never the 'proprietor' of the said property prior to the date of C registration. There can be no question therefore of any property in the said land being vested in the first applicant prior to the date of registration although the said land was approved for alienation as stated in the letter of the Assistant Collector of Land Revenue, Petaling Jaya, addressed to the first applicant informing him of the approval for alienation and setting out the fees to be paid and setting out also D the express conditions and the restrictions in interest. For the same line of argument please see also the judgment of Thomson CJ (as he then was) in *Malaya Borneo Building Society Ltd v M Ramachandran* [1959] MLJ 182.

Looking at the second limb of s 78(3) of the Code it seems clear to me that the restriction in interest could not have commenced before the date of registration E because the land remained state land and the restriction could not have meant to operate on the state authority.

[22] In the instant appeal, it is clear from the facts of the case that the said F restriction in interest commenced from the date of the registration of the document of title to the said land, ie, 25 September 1996 and thus the said land could not be transferred until 24 September 2006 and thereafter only with the consent of the state authority. I would have thought that having access to the records of the land registry in relation to any dealing over the said land, SP10 would be in a position to enlighten the court as to whether G the mandatory requirements under s 124 of the Code, discussed earlier, were adhered to before the state authority granted its consent for the transfer of the said land to the defendant. SP10 never elaborated on these matters neither has the defendant produced any form of evidence pertaining to the same.

H

[23] With regard to the said letter from the director of land and mines, learned counsel for the defendant canvassed the following argument in his written submission, namely:

I Given the fact that the state authority, acting within its jurisdiction, gave its consent to the transfer, and which transfer has been duly registered, both the High Court judge and the Court of Appeal ought to have correctly asked this question: *what injustice has the party complaining suffered by reason of the procedural breach*? It is respectfully submitted that the respondent in the instant case has suffered no injustice in this regard.

In the premises the instrument of transfer of the appellant was and is not void and consequently his registered interest cannot be impeached by the respondent. A

(Emphasis added.)

[24] Looking at that part of the submission reproduced above, it would seem that counsel for the defendant conceded that there was a 'procedural breach' on the part of the state authority when it granted its consent to the transfer, which from my reading would mean that the mandatory requirements under s 124 of the Code were not adhered to, but that the plaintiff 'suffered no injustice' as a result of the breach. I do not think that non-compliance with s 124 of the Code under the circumstances of this case can be described as a 'procedural breach' for the following reasons: B C

(a) the said restriction in interest was determined by the state authority at the time when the said land was approved for alienation to TKC pursuant to s 120(2) of the Code; D

(b) the said restriction in interest was indorsed on the document of title to the said land pursuant to s 120(3) of the Code;

(c) no evidence was adduced to show that TKC, as proprietor of the said land, had applied to the state authority for rescission of the said restriction in interest pursuant to s 124(1)(b) of the Code; further, no evidence was adduced to show that the state authority had approved such application, if any, and consequently had directed that the said restriction in interest be struck off the document of title or that a note of its rescission be so indorsed, whichever is applicable pursuant to s 124(3) of the Code; and E F

(d) no evidence was also adduced to show that the land administrator had signed a memorandum in Form 7 and had presented the same and that the registrar had made an entry on the register and issue document of title and authenticated the same pursuant to s 124(7) of the Code. G

[25] I do not think that it can be assumed or implied that the state authority had complied with s 124 of the Code in the instant appeal. It was held in *United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352 that if the terms of a statute are absolute and do not admit of any relaxation or exemption, anything done in contravention thereof will be ultra vires and no person can be estopped from putting forward the contention that what was done was illegal or void. H I

[26] In *United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)*, the dispute relates to a piece of land which has an express restriction in interest endorsed on the document of title under s 120 of the Code prohibiting, inter alia, the charging thereof without the written

A sanction of the state authority. One of the point which called for consideration was what is the effect of registration of a charge in breach of the restriction in interest imposed pursuant to the provisions of s 124(1)(b) of the Code. In his judgment, Edgar Joseph Jr J (as then was) said (at pp 355–356):

B I now turn to consider certain authorities (not cited to the court), which appear to be of direct relevance to the question for decision. In *Wong Fatt v Chong Ng* [1914] 1 FMSLR 142, the plaintiff who had become the holder of a registered sublease of mining land sought to eject the defendant. The primary defence raised was that the registration of the sublease had been obtained without compliance with certain statutory procedural requirements and that therefore the plaintiff had no title to C sue for ejectment. The Court of Appeal upheld this defence. In his judgment, Braddell CJ said, inter alia, at p 145:

> From these facts, it is clear that the provisions of s 81 of the Registration of Titles Regulations were contravened and that in as much as neither the original lease nor a provisional certificate lawfully issued in lieu thereof was before the registrar D when the registration of this sublease was applied for he had no authority under the Mining Code to register it and his act in making the endorsement on the office copy in these circumstances must be considered as ineffective to constitute valid registration.

E And at p 146 he said, inter alia, this:

> If what had been done by the registrar had amounted only to a neglect to observe some formality it might be that the court could see its way to cure the irregularity, but here this cannot be said to be the case for the presence of one or other of these documents is made, as I understand the Regulations and the Code, essential to the F right to register a sublease derived from such documents of title.

And, in the next paragraph, further down, he said this:

> Whether the sublease requires to be registered or not must in my opinion be answered with regard to the document itself and not to the title upon which it is G founded and as the period for which the sublease was granted exceeded or might exceed, if the renewal of the lease were obtained, a term of one year it seems to me that it is subject to the provisions of s 28 and therefore it is not capable of being made otherwise than in accordance with the provisions of the Code and as it has not been registered in accordance with the law it is null and void to pass a legal title H to the term which it purports to grant.

In *Chin Tai v Siow Shiow & Ors* [1971] 1 MLJ 67, a Federal Court decision, the transfer in favour of the purchaser was held by the court to be incapable of registration unless the permission of the collector of land revenue was obtained since the title to the land contained a restriction requiring such consent.

I In *Wong Kim Swee & Ors v Tham Hock Cham* [1981] 2 MLJ 207, a High Court decision, a restriction imposed on the title prohibited dealings with the land for ten years without the written approval of the collector of land revenue. An agreement for a lease executed in breach of this condition was held to be incapable of registration as being in breach of the Code.

In these circumstances, the charge having been registered in breach of an explicit statutory prohibition imposed on the title to the charged land pursuant to the provisions of s 120 of the Code, the title or interest of the chargee is defeasible since registration thereof had been obtained by means of an insufficient or void instrument (s 340(2)(b)) and also because the registrar of titles, in registering the charge, had acted ultra vires the powers conferred upon him: s 340(2)(c). The defence of estoppel accordingly fails since there cannot be an estoppel to evade the plain provisions of a statute: *Jagabandhu v Radha Krishna* ILR 36 Cal 920, particularly when as here, the non-compliance goes to the root of the thing. In other words, if the terms of a statute are absolute and do not admit of any relaxation or exemption, anything done in contravention thereof, will be ultra vires and no person can be estopped from putting forward the contention that what was done was illegal or void: *University of Delhi v Ashok Kumar Chopra* AIR 1968 Delhi 131.

Accordingly, no court is at liberty to enforce as valid, that which a statute has declared shall not be valid nor can compliance therewith be dispensed with even by consent of the parties or by failure to plead or argue the point at the outset: *Surajmull v Triton Insurance Co Ltd* AIR 1925 PC 83.

[27] I am of the view that s 124 of the Code is a mandatory statutory provision and any requirement contained therein has to be complied with before the state authority can exercise its power to consent for the transfer any land which is subject to a restriction in interest such as the one found in the instant appeal. Section 214(2)(b) of the Code provides that the power to transfer shall be so exercisable subject to any restriction in interest to which the land in question is for the time being subject to. Unless the said restriction in interest has been struck off the document of title or a note of its rescission has been indorsed on the document of title, I cannot see how there can be any dealing over the said land. It is only when the document of title to the said land has been cleansed of the said restriction in interest would the state authority be able to give its consent for the transfer of the said land to the defendant.

[28] It cannot be assumed neither can it be implied from the said letter from the director of land and mines that all the mandatory statutory provisions of the Code had been adhered to when the state authority gave its consent for the transfer. In *Goo Hee Sing v Will Raja & Anor* [1993] 3 MLJ 610, the issue before the court was whether a caveatable interest is acquired by a purported purchaser of land which has a restriction in interest that it cannot be sold, pledged, charged or transferred in any manner without the permission of the state authority. There was no evidence that the required consent from the state authority was ever applied for, let alone obtained. Mahadev Shankar J (as he then was) said (at p 613–614):

A This to my mind raises a question of paramount importance to the administration of land law in Malaysia, whenever the title contains a restriction in interest of the present kind. Because the prohibition in dealing with the land is total, nothing can happen without the consent of the *pihak berkuasa negeri*.

B Consequently, it must follow that a prospective purchaser, chargee, or lessee of such land can have no caveatable interest in such land until the consent of the *pihak berkuasa negeri* has first been irrevocably obtained.

Notwithstanding the comment of Judith Sihombing in her learned treatise on the National Land Code at p 43 'that, even the most ephermeral of claims to interests C can be caveated ...' I am impelled to this conclusion because the applicant has not been able to demonstrate that an application for approval had already been made and that the *pihak berkuasa negeri* was bound to grant that approval as a matter of course within a reasonable period of time.

D So until the grey areas surrounding the circumstances of the granting or witholding of consent to deal with land subject to such restrictions in interest are clarified, I regret to state that there is therefore only one decision that is possible in this case. The application for the maintenance of this caveat must be dismissed.

E **[29]** Following the authorities referred to above, I am of the view that the transfer of the said land by TKC to the defendant was clearly in breach of the provisions of the Code. The document of title has yet to be cleansed of the said restriction in interest and without the title being freed of such restriction in interest, the transfer of ownership was incapable of registration. That being F the position, I am of the view that the registration of transfer of ownership to the defendant is not indefeasible since registration thereof had been obtained by means of an insufficient or void instrument pursuant to s 340(2)(b) of the Code. The document of title to the said land was endorsed with the said restriction in interest and yet the land administrator saw it fit G to register the dealing, ie, the transfer of ownership to the defendant notwithstanding the title has yet to be cleansed of the said restriction in interest. The existence of the endorsement of the said restriction in interest on the title to the said land itself should have put him on guard or should have put him on inquiry. The land administrator as a public officer would at all H times be duty bound to see that dealings in land do not fall foul of the provisions of the Code. He cannot act contrary to the mandatory provisions of the Code or ignore the statutory requirements simply on the premiss that the state authority has given its consent to the transfer. Section 340 of the Code reads:

I (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible — A

(a) ...; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or B

(c) ...

(3) ...

(4) ... C

I would hence conclude that the defendant's title to the said land is not indefeasible. It was obtained without due compliance with the mandatory statutory requirements under the Code in relation to any dealing over the said land which is subject to the said restriction in interest without obtaining a rescission of the same prior to the dealing. D

[30] In the course of canvassing the appeal, counsel for the defendant pointed out that with regard to the issue as to whether the transfer of the said land to the defendant is valid, the Court of Appeal based its judgment on the premise that the defendant relied on the purported consent given by the director of land and mines and so 'everything turns on whether the director acted lawfully in giving his consent'. Counsel then referred to the said letter from the director of land and mines and submitted that the Court of Appeal misconstrued the facts and that the defendant was in fact relying on the consent of the state authority. Counsel pointed out that the consent for the transfer of the said land to the defendant was not given by the director of land and mines and that the director merely communicated the consent of the state authority as can be seen from the said letter. Counsel then argued that in the circumstances the substratum of the judgment of the Court of Appeal falls to the ground having as its basis erroneous facts. E F G

[31] I cannot find any merit in the contention canvassed above. What is clear from the said letter is that the director of land and mines was merely conveying the message to TKC that the state authority had given its consent for the transfer. From the judgment of the Court of Appeal it can be deduced that the learned judges misread the said letter written by the director of land and mines. In his judgment, Gopal Sri Ram JCA appreciated that the defendant obtained no title as there was a breach of the Code. Further, the said letter from the director of land and mines was not the root of the issue raised in this instant appeal. The main issue which is the substratum of this appeal is whether the state authority can grant its consent to the transfer of the said land whilst the said restriction in interest still remained on the document of title. I do not think that the state authority can simply ignore H I

A the said restriction in interest endorsed on the document of title to the said land and grant its consent for the transfer. Thus, borrowing the words of Mahadev Shankar J in *Goo Hee Sing v Will Raja & Anor*, that 'until the grey areas surrounding the circumstances of the granting ... of consent to deal with land subject to such restrictions in interest are clarified', there is therefore only
B one decision that is possible in this instant appeal, that is, it must be dismissed.

[32] The first question formulated is whether the state authority has the power, *expressly or impliedly*, to grant consent to TKC, the registered
C proprietor to transfer the said land. The second question posed is whether the defendant's title has become indefeasible after the grant of the consent of the state authority. As discussed earlier, the state authority has the power to grant consent for the transfer of the said land to the defendant provided the document of title has been cleansed of the said restriction in interest. Since
D the document of title to the said land still contain the said restriction in interest, and again borrowing the words of Mahadev Shankar J in *Goh Hee Sing v Will Raja & Anor*, 'the prohibition in dealing with the land is total' and nothing can happen until that prohibition has been overcome. Under the circumstances of the instant appeal, the court cannot simply imply that s 124
E of the Code had been complied with just because the state authority has granted consent to the dealing. It is for these reasons that I would conclude that the defendant's title to the said land is not indefeasible.

F **[33]** In the light of the above, my answer to the first question is in the negative. As this answer is sufficient to dispose of the appeal, I find it unnecessary to answer the second question posed. The appeal is hereby dismissed with costs. I would also make an order that the deposit be paid to the plaintiff on account of taxed costs.

G **[34]** My learned brothers S Augustine Paul FCJ and Zulkefli Ahmad Makinudin FCJ have seen this judgment in draft and concurred with it.

Appeal dismissed with costs.

H

Reported by Ashgar Ali Ali Mohamed

I